ment, petitioner duly appealed to the Supreme Court of Missouri (R. 2), where the judgment was affirmed (R. 219).

The amended petition on which the case was tried (R. 4) after formal averments as to the employment of David in interstate commerce, his death and the appointment of the administratrix, averred (R. 5) that David was a train rider, "whose duty it was to ride upon the trains of the defendant for the purpose of protecting its property and the property carried by it from damage and loss, and in general to watch over and guard the trains and property carried upon the trains of defendant, while in transit." It further averred (R. 5) that the defendant prior to said date had employed "a certain person as an *informant* who was known by defendant at said time to be an ex-convict, a thief and robber who *consorted* with thieves, robbers, murderers and other desperate persons and that the defendant instructed said informant *to continue to consort* with thieves, robbers, murderers and persons of desperate character and to learn of their plans and designs especially with reference to theft or robbery of property of the defendant, or in its possession, and further instructed said informant that whenever he should learn of any proposed robbery or theft of or from the defendant, that said informant should report such fact to the defendant, to the *end* that such thieves or robbers might be *interrupted and apprehended.*"

It further averred (R. 6) "that said informant entered upon said employment and was regularly paid by

the defendant therefor; that at some time prior to the 17th day of May, 1923, the said informant, then in the employ of defendant, * * * consorted with certain desperate persons known to said informant to be thieves, robbers and murderers and said persons informed said *informant* that they intended to rob a certain train of the defendant at Leavenworth, Kansas, in the early morning of said May 17, 1923; that said informant, the *agent* of defendant, accompanied the thieves and robbers to said Leavenworth, Kansas, well knowing the designs and intent of said persons, and knowing that they were armed with firearms and knowing that they were of such desperate character that they would take human life in order to accomplish their purpose or to protect themselves if interfered with, and knowing that train riders and train crew on said train would be subjected to the hazard of an encounter with said desperate persons, and said informant went with said persons and remained until the arrival of said certain train of defendant, and upon the arrival of said train said persons, in the presence of said informant, surrounded said train with the intent to rob the same."

The amended petition further averred that said David was riding said train as a train rider on the morning of said contemplated robbery (R. 6-7) "without any knowledge or warning of said contemplated robbery."

It further averred (R. 7) "that said thieves and robbers while attempting to carry out their designs to rob said train, saw said David upon said train and did then and there with a firearm shoot and kill said David in the early morning of said May 17, 1923."

It further averred (R. 7) "that said defendant, through its agents and employees, knew of said contemplated robbery in time, by the exercise of ordinary care, to have frustrated and prevented the same, and to have afforded protection to said James Lee David, and to have warned said James Lee David of said proposed robbery so that the said James Lee David could have protected himself, but said defendant negligently and carelessly failed so to do and as result thereof said James Lee David was shot and killed."

The Answer (R. 8) consisted of a general denial and a plea of assumption of risk by the deceased.

SUMMARY OF THE EVIDENCE.

In order to show the employment of McCarthy as an informant and what the petitioner expected to obtain from him thereby, the plaintiff on the trial below introduced in evidence the depositions of R. S. Mitchell, Chief Special Agent of the petitioner (R. 11), and W. H. Boullt, Assistant Chief Special Agent (R. 33). In Mr. Mitchell's deposition (R. 16-18) the reasons for employing McCarthy, the situation confronting the railroad at the time, and the nature of McCarthy's employment, are given fully. In brief, Mr. Mitchell's testimony showed that the Missouri Pacific was at the time being harassed and robbed by an organized gang of thieves in and adjacent to Kansas City; that he learned that McCarthy was a member of this gang, and would, for a consideration, be an informant against this gang. He testified (R. 17):

"I arranged with him to keep us informed as to the activities of this gang, to give us advance information if possible, when this gang planned to rob our trains, and further arranged with him in the event he could not get to us, couldn't give us advance information, to give us information then as to the 'fence', where the stuff was taken, as well as who was in the robbery, and all the details possible."

He testified further that he introduced McCarthy to Boullt and arranged with McCarthy to report to Boullt and to make his reports by telephone; that the matter was then turned over by him, Mitchell, to Boullt, and to no one else, for handling with McCarthy. He further testified (R. 29) that his sole purpose in employing McCarthy was to get information of the activities of this bunch of thieves who had been robbing box cars; that he did not authorize McCarthy to carry a gun nor do any act of apprehending any person or do any criminal act; that McCarthy was simply to get information; that he was not to stage any robberies, but was simply to continue trailing with these thieves. That after the killing of David, McCarthy assisted in convicting Gladson, who is now serving a life sentence for shooting David.

The testimony of Mr. Boullt with respect to the employment of McCarthy, the reasons therefor, and the activities expected of him, was in line with the testimony of Mr. Mitchell.

Testifying as to McCarthy's instructions (R. 41) he said:

"Well, we couldn't very well give him *instructions*. He was a man to furnish us with *in-*

formation where these robberies were committed, who was committing them, and, if he could get to us in time, to tell us before the robbery was committed; if not, to tell us what had become of the goods.

"Q. Well, what was the plan and arrangement with respect to whether or not he was to go with this gang on their robbing expeditions?

A. He was to continue the same as he had, to get information; that is generally *up to the man's own idea,* that is working. * * * His instructions were that he was to get us word before the robbery was committed if he could; if not, to give us information as soon as he could after the robbery had been committed. He was to report this information to myself. I advised him to reach me through the telephone."

Further on he testified (R. 42):

"Q. Now, you say if it was 'possible' McCarthy was to give you this information in advance of the robbery?

A. If he could, yes, sir.

Q. By 'possible' do you mean if he could do that without letting the gang know he was giving the information?

A. Why, *he would have to use his own judgment about that.* You see *we could not tell him how to use this information.* * * *

Q. But I understand he was to notify you if he could without tipping off the gang that he was giving notice?

A. That is right."

This witness further testified (R. 43):

"Q. As to his *ways* and *means* and *methods* of securing this information for you with respect to who this gang was when they were robbing you, and if they had robbed you, what became of the

goods, *you left that largely to the discretion of McCarthy.*

A. Yes, to furnish us the information."

The witness then detailed numerous reports of intended robberies made by McCarthy to him, and testified that on preparing to meet the intended robberies, the thieves failed to appear. Asked with regard to the attempted robbery at Leavenworth, in which David was killed, witness said that he first learned of it by getting a telephone call the morning after David was killed. Asked if McCarthy had made any report of this intended robbery prior to its occurrence, he said he had not (R. 49).

He further testified (R. 52) that the first report he had from McCarthy was about seven o'clock the next morning. The witness was in Leavenworth, Kansas, when he received this information by phone; that later he had a talk with McCarthy; that McCarthy gave him all the information on who killed David, how it happened, and accompanied Boullt to Leavenworth and made a report to the county attorney; he also gave information as to the names of the persons in the gang and how they went to the scene of the shooting.

Those parts of the deposition showing McCarthy's report to Boullt as to when this particular robbery was arranged, and of his ineffectual efforts to telephone to Boullt, appearing on pp. 53 and 54 of the record, were withdrawn by the plaintiff, but were offered by the defendant (R. 60) and excluded by the court.

Mr. Boullt further testified (R. 56) that McCarthy was to report to no one but him, Boullt. He further testified (R. 57):

"Q. As I understand you, McCarthy was not to report an intended robbery to you unless he could do it without letting the gang know that he was so reporting?
A. Not uncovering himself. Not so he would uncover himself.
Q. So they would not get on?
A. Yes.
Q. Was McCarthy instructed to instigate any robberies in order to lead the gang into a trap?
A. No, sir."

The plaintiff introduced in evidence the deposition of Albert Charles Gladson (R. 61-68) taken at the Lansing, Kansas, State Penitentiary. On the question of planning this robbery Gladson testified that the gang, including McCarthy, were on the 16th of May hanging around the Court House in Kansas City, Kansas, listening as spectators to the trial of one Hogie Ward, who was then being tried for the payroll holdup of Wilson & Co. (R. 62). That along about noon of that day he had some talk with McCarthy about robbing the Missouri Pacific box cars at Leavenworth that night (R. 63). Asked whether any plan or arrangement was made at noon to commit this robbery, he answered (R. 63):

"Why, all the boys what belonged to the gang was supposed to go down to Riley's house right after the trial, meet down there.
Q. And then what was to be done?
A. Then they was going to make arrangements, try to get two cars to go up, some of the boys didn't want to come up."

He further testified (R. 66) in substance that the gang left the court room about six o'clock in the eve-

ning and went to Riley's house; that there were two carloads of them. Asked further about their plan he testified (R. 67):

> "Why we consulted all of us down there, and some of them didn't want to go so we who did want to go—it was I and McCarthy and Lawrence Hayes and Charles Masterson, four of us started and made it up to go that night about six-thirty or something like that. * * * I had a date with a girl that night so I wanted to go up and see and put it off and Charles Masterson had to go to see the doctor so Lawrence Hayes and McCarthy and I and Masterson went up to Wyandotte and I got off at 10th and Central and Masterson went up to the doctor's office so I made a date with him to meet me as he was going back. * * *
>
> Q. To meet you where?
>
> A. At 10th and Central.
>
> Q. Where were they going?
>
> A. To the doctor's office, and then go down to see this freight go through (Kansas City, Kansas) *and see what was on it.*
>
> Q. Where did they say they were going to see the freight, to what street or crossing?
>
> A. It foots there at 3rd and Minnesota.
>
> Q. What was the purpose of going down to see the train as it went through?
>
> A. Why mostly to see if there was *any good merchandise* on it."

Gladson further testified (R. 58) that he met McCarthy and Lawrence Hayes at 10th and Minnesota at nine o'clock that night; that they wanted another man and went down and got Red Loar, who was then in bed and the lights were all out in the house; that they went from there to Gladson's home and then drove to Leavenworth, arriving about 12:30 that night and waited

for the freight train to arrive. He testified further (R. 69):

> "Q. Well, when the train came in what was done if anything toward carrying out your plan and purpose of robbing the train?
> A. Why, McCarthy and I and Red Loar got out of a car and McCarthy and I went over to the railroad track and hopped on the train and went on down in the yards. The train stopped down there."

No further details of what occurred at the time of the fatal shooting of David, nor how nor where the witness shot David, were called for or developed by plaintiff's counsel in this deposition of Gladson, although Gladson was then in the Lansing State Penitentiary serving a life sentence under a conviction of murdering David.

As a part of Gladson's cross-examination a transcript of his previous testimony in the trial of one of the criminal cases was attached to the deposition and was received in evidence on the trial.

On pages 96 and 97 of the record will be found a description by Gladson of the tragedy when David was shot, especially the talk between Gladson and David, just before the shooting. It appears from this testimony that David threw a flashlight on Gladson and commanded him to come over on that side of the train and that Gladson refused and the fatal shots followed.

Plaintiff read in evidence the deposition of Lawrence Hayes taken at the State Penitentiary at Lansing, Kansas. This deposition (R. 117-167) consists in the main of an account of the activities of his gang. Being asked about any conversation with McCarthy

during the day of May 16th, about robbing any particular train, he answered (R. 120): "Well, not exactly."

Asked further about any plan to rob this particular train that night, he said (R. 120):

> "A. There was no plan or anything made, just—we didn't have no set plans to rob cars that we figured on ahead, just what we were to do."

The witness then testified, giving some of the details of the gang's meeting at Riley's. He testified further that later in the evening, about 8 o'clock, he and Masterson and McCarthy drove to the doctor's office where Masterson got out and went in the building to see the doctor; that McCarthy got out of the car also, and said he was going into the drug store; that he stayed in the car when Masterson went to see the doctor; that when Masterson came back he and Masterson sat in his car a while *just across from the drug store* and then went into the drug store; that McCarthy was in there; that he had *seen McCarthy go into the drug store* (R. 123) but while he did so he, Hayes, stopped *in front of the drug store.* Asked what McCarthy was doing in the drug store when he and Masterson went in, witness said (R. 124):

> "Why, I do not know; I guess he was looking around—just—I don't even know what he went there for, I guess he wanted a drink or something but he was not drinking when we got there, he joined us in a drink."

Witness testified that afterwards they went from the drug store and picked up Gladson; that Masterson

did not accompany them; that they went to the foot of Minnesota Avenue where a freight train was pulling in and they got out of the car and watched the freight train go by; that after picking up Gladson and Loar they went by the home of McCarthy; that McCarthy went onto the front porch and got a pair of overalls and a jumper he had there (R. 126) and while he did so the witness and others stopped in the street *where they could see McCarthy all the time* (R. 127).

Hayes further testified on cross-examination (R. 152-153) that he participated in the train robbery at Nearman, Kansas, between Kansas City and Leavenworth, of this same train about a month before David was killed, in which robbery Masterson was shot; that the "bulls" (train riders) did the shooting; that Gladson and Masterson were armed; that McCarthy was not with them that night. He further testified (R. 139) that on the night of May 2nd, about two weeks before David was killed, he, Hayes, participated in a robbery of the same train at Woolcott (between Kansas City and Leavenworth); that Bert Gladson, Red Loar, George Riley, Hobart Ward, Freddie Thompson, John Rock, Sonny Davis, George Oftener and himself participated in that robbery; that they had two automobiles and robbed most of the whole train; that they held up the brakeman and made him stand still at the road crossing while they robbed the train; that they loaded the stuff into the trucks and got away.

Testifying further as to the arrangement to rob the particular train that David was guarding when killed, the witness said (R. 154):

"Q. The talk you had with McCarthy when you started out was that you were going to rob some box cars, you didn't know just what box cars you were going to rob?

A. He suggested the Missouri Pacific himself.

Q. He suggested that to you but you had not made any plan to rob *any particular train* until you started from Riley's house?

A. *Until we went down to the foot of Minnesota Avenue we didn't know we were going to rob that train then.*"

The only other witness introduced by plaintiff who testified to anything in relation to the arrangement for the robbing of the train in question was Mrs. Ada A. Riley, the widow of George Riley, the latter being the reputed head of this gang of thieves. She testified in substance (R. 171) that on the evening preceding the killing, Gladson, Hayes and McCarthy were at their home and something was said about their going up to Leavenworth, and that she heard her husband, George, say "I wouldn't go up there tonight for fifty dollars; you have made that place too hot—it's hot—I wouldn't go up there for fifty dollars," so George didn't go and Freddie wouldn't go; that McCarthy asked Freddie for a gun, which was refused. Thereupon McCarthy, Gladson and Hayes went into the back yard.

Sophia David, the widow, testified (R. 172-176) that her husband worked for a coal company during a strike in Kentucky several years previously, his work being that of looking after the place for others, where they had a machine gun with a headlight on top of the building; that from 1911 to 1915 her husband was employed by the Pinkerton Detective Agency as a guard

walking a beat for them in Kansas City, and that he was armed at the time of such service; that during the time he was working for the Missouri Pacific he had in his possession and carried a revolver and a sawed-off shot gun.

There was no other evidence introduced by the plaintiff tending to show the circumstances immediately attending the killing of David, nor what opportunity McCarthy had, if any, to telephone word of the intended robbery to Mr. Boullt.

At the close of plaintiff's evidence defendant interposed a demurrer thereto, which was overruled (R. 178).

The defendant introduced as a witness, L. Q. Moore, who testified that he was a special agent for the Missouri Pacific (R. 178 *et seq.*) and to his having become acquainted with David in Kentucky where David worked for him a few months in 1907 or 1908 during the coal strike, during which time David was armed and on one occasion David had kept another man from shooting him, Moore; that he next saw David on December 18, 1922, and talked with him regarding a job on the Missouri Pacific. David wanted a job as special agent or train rider if such a job was open; that arrangements were then made for David to meet Mr. Barber, another official of the Missouri Pacific, whereupon he took him to Barber with a view of such employment, and conversation was had between Barber and David regarding his duties and the nature of the position; that Barber told David there was a lot of thieves on the road and he had a position open as a train rider; that they were having a lot of train rob-

beries and said that there was a position open. He further said, "I want to know whether you will fight these fellows or not," to which David replied, "*I will fight them until I die.*" That thereupon arrangements were made for David to start work; that David was provided with a .45 automatic Colt revolver and a sawed-off No. 12 shot gun, loaded with No. 1 buckshot; that David and one Boyd were assigned to riding trains between Kansas City and Leavenworth; that witness told David to be careful and look out for these fellows, and also gave him all the pointers he could.

> "Q. State what you said about the danger if any of dealing with these men.
> A. I told him they would shoot him just as quick as they saw him and to be careful—'be careful and watch your step,' is about what I said to him."

This witness further testified (R. 184) that during the time of David's employment in this work, until the witness left Kansas City, he saw David every morning when he came in; that he had the sawed-off shotgun and revolver at all times.

H. M. Dougherty testified (R. 186) that he was conductor in charge of the train David was riding at the time of the fatal shooting; that he saw David on the train that night previous to getting to Leavenworth; that David boarded the train at the A-C Junction, being armed with a sawed-off shotgun and a revolver and rode the caboose that night to Woolcoltt; that when the train stopped at Woolcott, David went on up through the train and stayed up on the head end of the train from Woolcott; that one of the train riders

rode one end of the train and the other, the other; that the next stop after Woolcott was South Leavenworth; that on reaching South Leavenworth, his train took the passage heading of the main line; that that was the meeting place of trains; that he had been on the passing track that night about ten minutes before he heard the shooting; that witness was walking between the passage track and main line train when the shooting began; Boyd, the other train rider, was right behind him; that they were at that time about fifty cars from the caboose and about four or five car lengths from the place of the shooting; that when the shooting began Boyd then commenced shooting and witness then went up to where David was, about twenty-five cars ahead, and found David lying on the ground dead; that David had a sawed-off shotgun and revolver with him; that train riders usually carry a flashlight which they use in examining seals; that witness didn't see anybody do the shooting, and didn't see David when he was shot; that it appeared that David was shot from someone standing up and the shot ranged downward; he was shot probably in the breast somewhere (R. 191).

C. M. Barber, Assistant Chief Special Agent of the defendant, occupying the place Mr. Boullt occupied prior to his death, testified (R. 192-201) that he was formerly special agent for defendant, his general duties being to employ men to guard the company's property in the capacity of special agent.

The witness testified to the circumstances of his employment of David and the nature of the work he wanted done. He testified (R. 194): "I told him (David) that we were having a great deal of trouble

with a bad gang of train robbers robbing our trains en route, and that I was looking for a man of sufficient ability to cope with them—a man who was not afraid to cope with them and a man who would shoot and use good judgment and watch things, and if necessary to possibly kill them, and after I had gone over the matter thoroughly with him, he said 'I will take the job,' or words to that effect. * * * I explained to him that they had been robbing the trains en route, throwing the stuff out en route, and they were a large gang and a bad gang, that they were armed, all of them, and that all of them would shoot him on sight and that he had to be very careful about his own life."

He testified further (R. 195) that David was carrying a pistol and a sawed-off shotgun; that they were given him for the purpose of defending himself and the company's property * * * "there was a general instruction out to all our men to carry their arms anywhere they go, anywhere so they could get hold of them, because they were told they would be liable to need them at any time."

The witness then (R. 195-196) detailed the circumstances of the train robbery at Woolcott about two weeks previous to David's shooting; that that was on the train David was to have ridden that night but which train David had left chasing some thieves in the Kansas City yards and the train pulled out and left him; he further testified that David was fully advised as to what occurred up at Woolcott that night, along with the other man; that Boyd usually rode this train with David; Boyd was armed with a pistol; he was not sure whether he carried a shotgun; that all train riders

were supposed to carry flashlights with which not only to examine seals but to protect the train rider from hiding bandits between the cars. Asked if there had been any other attempts to rob the train other than this Woolcott robbery up to that time, the witness answered "Many, many." He further testified (R. 198) that prior to the killing of David, two of the Kansas City, Kansas, thieves, Loar and Gladson, had been tried and convicted of an Osawatomie, Kansas, robbery and were then out on bond.

The witness further testified (R. 199) that he did not advise other special agents, or train riders or anyone of the employment of McCarthy; that this employment was kept a secret; that it was not calculated to come to the knowledge of any of the company's employees outside of the heads who employed him. Witness further testified that he had no knowledge of the purpose of Gladson and others to rob this train before David was killed; that he first learned of the killing early the next morning. He further testified on cross examination (R. 200) that he had never known McCarthy prior to the time David was killed nor come in contact with him at any time; that he had nothing to do with the employment of McCarthy.

At the conclusion of all the evidence the petitioner again asked a peremptory instruction directing a verdict for the petitioner, which was refused by the court.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The Supreme Court of Missouri, in an action under the Federal Employers Liability Act, has again failed to follow the rule of this court as to assumption of risk, by a servant, announced in its numerous decisions such as:

Pryor v. *Williams*, 254 U. S. 43, 45, 46.
Toledo St. L. & W. R. Co. v. *Allen*, 276 U. S. 165, 168, 169.
Boldt v. *Penna. R. Co.*, 245 U. S. 441, 445.

It has again applied, in effect, the so-called "Missouri" rule which virtually eliminates assumption of risk as a defense, leaving the master in such cases to the defense of contributory negligence only, holding that the servant's knowledge of the risk is not conclusive against him.

2. The decision of that court to the effect that the arrangement with McCarthy, by which petitioner sought to obtain from him information as to the activities of the gang of thieves of which McCarthy was a member, constituted McCarthy an agent of the petitioner, so as to impute to the petitioner the knowledge of the intended activities of his gang, though uncommunicated by him to petitioner, is in conflict with the well settled rules of the common law as enunciated by the federal courts and state courts generally.

3. The decision of that court to the effect that the ineffectual attempt of the petitioner to

obtain advance information of intended robberies through McCarthy threw upon petitioner the duty of giving David advance information of the intended robbery in question, is in conflict with the decision of this court in *St. L. & S. F. R. Co.* v. *Mills,* 271 U. S. 344.

4. The Supreme Court of Missouri, whose decision is sought to be reviewed herein, is the highest court in such state in which a review of this action could be had.

BRIEF IN SUPPORT OF PETITION.

I.

This Court Has Jurisdiction.

The respondent brought this suit under the Federal Employers Liability Act (U. S. C. Title 45, Sec. 51), to recover damages for injuries growing out of the death of her husband, an employe of petitioner, while both were engaged in the work of interstate commerce.

The trial court and the State Supreme Court held that the evidence was sufficient to show that petitioner was liable under the Act and sustained an award of damages to respondent therefor.

The rights and obligations of the petitioner depend on that Act and the applicable principles of the common law as interpreted by the federal courts.

The kind or amount of evidence required to establish liability, and the rules applicable to such evidence, are not subject to control of the several states.

The rule is well settled that this court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain the finding that the carrier was negligent, and that this negligence was the proximate cause of the injury, the judgment against the carrier will be reversed on certiorari.

Chicago M. & St. P. R. Co. v. *Coogan*, 271 U. S., 472, 474 and cases cited.

St. L.-S. F. R. Co. v. *Mills*, 271 U. S. 344.

II.

Under the Evidence and the Applicable Law as Interpreted by the Federal Courts, David Assumed the Risk of His Fatal Injury and Petitioner Is Not Liable for His Death.

In his contract of employment, David assumed the risk of being shot by a train robber in protecting petitioner's trains from robbery. He was employed and fully armed for this express purpose. He was fully apprised of all the dangers attending his work. It is well settled in an unbroken line of decisions of this court and other federal courts, and of numerous state courts, that he assumed the risk of his fatal injury and that no recovery can be had against petitioner.

Boldt v. *Penna. R. Co.*, 245 U. S. 441, 445.

Toledo St. L. & W. R. Co. v. *Alben*, 276 U. S., 165, 168, 169.

Cudahy Pkg. Co. v. *Marcan*, (8th C. C. A.), 106 Fed., 645, 647.

King v. *Morgan*, (8 C. C. A..) 109 Fed., 446, 450.

Chi. G. W. Ry. Co. v. *Crotty*, (8th C. C. A.), 141 Fed., 913, 916.

So. Pac. Co. v. *Seley*, 152 U. S. 145.

Kohn v. *McNulta*, 147 U. S., 238.

Seaboard Air Line R. Co. v. *Horton*, 233 U. S. 492, 504.

Morey v. *Maine Central R. Co.*, 126 Me., 272; 133 Atl. 92.

Ashton v. *Boston & M. R. Co.*, 222 Mass., 65; 109 N. E. 820.

Meyers v. *W. C. DePauw Co.*, 138 Ind., 590; 38 N. E. 37.

A late expression of the rule by this court, which is in full harmony with the other cases cited, is found in *Toledo St. L. & W. R. Co.* v. *Allen, supra,* where this court said, *inter alia*:

> "And except as specified in Section 4 of the Act (45 U. S. C. A., Sec. 54), the employe assumes the ordinary risks of his employment, and when obvious, or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees" (citing authorities).

In *Cudahy Packing Co.* v. *Marcan, supra,* Judge Sanborn, in discussing the effect of an assumption of risk by the servant, said, at page 647 of the opinion:

> "By entering upon and continuing in the employment, he assumes these risks and dangers, and no negligence can be charged to the master and no liability can be fastened upon him because he fails to give notice or warning of, or to remove these common risks of the employment" (citing authorities).

In *Morey* v. *Maine Central R. Co., supra,* in discussing the assumption of risk by the servant, it is said:

> "Dangerous work must be performed; and work must be done in dangerous places, and when a workman makes a contract to do such work, or to work in a dangerous place, he contracts with reference to that danger and assumes the 'open and obvious risks incident to the work' or, as some times expressed, 'such dangers as are normally and necessarily incident to the occupation.' This is a contractual assumption of

risk. *Ashton* v. *B. & M. R. Co.*, 109 N. E. 820; 222 Mass. 65, 69; *Seaboard Air Line Co.* v. *Horton*, 233 U. S. 492. With reference to risks and dangers covered by the contract the employer owes the employee no duty and so cannot be held guilty of negligence."

In *Meyers* v. *W. C. DePauw Co., supra*, the Supreme Court of Indiana, said:

> "The fact that the service is a dangerous one adds nothing to the liability of the master for injuries resulting from the natural and ordinary incidents of the undertaking."

The proposition boldly asserted in the opinion below to the effect that though there was an *assumption of risk* by the servant, yet that there was a *continuing duty of the master* to *minimize or obviate* the *well known dangers*, finds no support in the decision of this court in *Hough* v. *T. & P. R. Co.*, 100 U. S. 213, a small excerpt from which is quoted (R. 230), in the opinion below.

The learned author of the opinion, in fairness to this court, should have quoted the remaining part of the sentence, so that the limited application of the quoted part might be seen.

His attention should also have been challenged by the latter part of that opinion, where Mr. Justice Harlan was careful to state the correct rule of assumed risk applicable to the facts in that case, thus (25 L. Ed. p. 617):

> "If the engineer after discovering or recognizing the defective condition of the cowcatcher, or pilot, had continued to use the engine, with-

> out giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery so far as such defect was found to have been the efficient cause of the death. *He would be held in that case to have himself risked the dangers which might result from the use of the engine in such defective condition*" (italics ours).

The case of *Pantzar* v. *Mining Co.*, 99 N. Y., 368, from which the learned author of the opinion below, made an excerpt of a single brief sentence is not an authority to support the conclusion drawn therefrom by the learned author in the opinion below. The New York Court of Appeals in that opinion was dealing with a situation where the *servant had no knowledge of the dangerous condition of his place of work.* The court on the concluding page of the opinion said:

> "The evidence tends to show that the plaintiff was ignorant of the dangerous condition of the rock and that his duties did not call him to any place from which it could be observed. He therefore * * * is not justly censurable for an omission to discover the impending danger himself in time to avoid it."

If any doubt could be thought to have been cast on the well settled doctrine of assumption of risk by the quoted excerpt from the Pantzar case, that doubt was quickly and fully dispelled by that court in *Sweeney* v. *Berlin & Jones Envelope Co.*, 101 N. Y., 520; 5 N. E., 358, where, denying a recovery to an injured servant because he had assumed the risk from which he received his injury, the court in a unanimous opinion said:

"It is plain that the danger, to the knowledge of the plaintiff, was inherent in the use of the machine and to the work itself. The peril did not grow out of extraneous causes or circumstances which could not be discovered by the use of ordinary precaution nor to a condition of things different from those existing at the beginning of the service. It was part of the plaintiff's engagement that the master's work should be performed in the usual course and way of business. The work which the servant was called upon to do at the time in question was not of a different character from that which he originally undertook. The machine upon which it was to be done was one then in use. No new duty or species of labor was imposed upon him, nor was he required to work a machine with which he was not familiar. He was simply called upon to do that for which he was engaged, the doing of which formed the consideration for his employment. To say that the master should be liable to the servant in such a case is to say that he should not have the benefit of the labor for which he contracted. Such is not the law. * * * Under such circumstances there is no ground for charging the defendant with negligence or throwing upon it a risk assumed by the plaintiff when he took employment."

Applying therefore the applicable law of assumed risk to this case, it certainly must be held that after employing David and arming him for the express purpose of protecting its trains from train robbers, under an agreement that he would so protect said trains, petitioner was under no duty to employ some other person to obtain advance information of intended robberies and to frustrate the same, so as to keep train robbers from coming into contact with

David, nor under any duty to give him advance information of the time and place such robberies were intended to occur.

III.

David Was Not Entitled to Special Warning.

The inherent nature of David's work was sufficient warning to him of the danger which caused his death. No duty, therefor, rested, on his employer to obtain and give to David notice of this particular intended train robbery.

3 Labatt, Master and Servant, 2d Ed. Sec. 1113, p. 2939, *id.* p. 2948.

Lowrey v. *Atlanta Joint Terminals*, 145 Ga. 782; 89 Southeastern, 832.

30 C. J. p. 502.

Atlantic Coast Line v. *Southwell*, 271 U. S. 654; 48 Sup. Ct. 25.

Manwell v. *Dourst*, 178 California, 752; 174 Pacific, 881.

1 A. L. R. 669.

Feaster v. *Southern Ry. Co.*, 15 Fed. 2d. 540.

St. L.-S. Ry. Co. v. *Mills*, 271 U. S. 344; 46 Sup. Ct. 520.

IV.

David Had No Knowledge of the Employment of McCarthy As An Informant and Petitioner Had Never Undertaken or Held Out to David That It Would Furnish Him Advance Information of Any Particular Robbery.

The mere fact that petitioner had voluntarily undertaken to do more in anticipating robberies than it was obliged to do, did not make the furnishing of

such information to David a duty on petitioner's part. Therefore, regardless of whether McCarthy was the agent or servant of petitioner, or was an independent contractor, petitioner was not legally responsible to David for the failure of McCarthy to communicate to petitioner advance information of the intended robbery. There was no such duty at common law nor any duty assumed in petitioner's contract toward David.

St. L. & S. F. R. Co. v. *Mills*, 271 U. S., 344.

V.

McCarthy Was Not the Agent of Petitioner.

The ruling of the court below to the effect that the secret arrangement made by petitioner with McCarthy to furnish petitioner information of the activities of this gang of thieves and train robbers had the effect of constituting McCarthy the agent of petitioner, so that his uncommunicated knowledge of an intended robbery was imputed to petitioner, is without support either in principle or authority.

An agent is one who transacts some *business* for his principal in the place and stead of the latter. 2 C. J., p. 420, Sec. 4.

By the arrangement with McCarthy he was to *continue to consort with his gang of thieves* as he had been doing prior to the arrangement with petitioner, and was simply to furnish certain information which he should acquire *in carrying on his occupation of thievery.* The continuance of McCarthy in consorting with this gang of thieves as he had been do-

ing prior to this arrangement, and his participation in their secret plans for train robberies and other acts of thievery, and carrying these plans into execution, was not the transacting of any *business of petitioner.* McCarthy used his own means and methods, and was not in any respect under the control of petitioner. He was, therefore, not an agent or servant of petitioner, but was at most an independent contractor.

2 C. J., p. 424, Sec. 10.

3 Words and Phrases, 3d Series, p. 206, title "Employee."

4 Words and Phrases, 3d Series, pp. 222-229, title "Independent Contractor."

VI.

Under the Evidence (R. 41, 42, 43) McCarthy Was the Sole Judge of Whether He Could With Safety to and Without Uncovering Himself to His Associates, Telephone or Otherwise Advise Boultt of the Intended Robbery.

In the very nature of McCarthy's situation this was a matter entrusted to his sole judgment and discretion. No one but McCarthy could know what surveilance was being kept by the gang over his movements. Hayes admitted that he saw McCarthy go into the drug store and that he (Hayes), stopped his automobile in front of the drug store and finally that he and Masterson followed McCarthy into the drug store (R. 123). After leaving the drug store, picking up Gladson and Loar and going to McCarthy's house, where he got a pair of overalls and a jumper (R. 126), that while McCarthy was getting these articles,

the witness and others stopped in the street *where they could see McCarthy all the time* (R. 127). Evidently McCarthy had some intimation from the gang that they were suspicious of him and that this was the real reason that several members of the gang, including their leader, refused to go with him on the night David was killed. It should be remembered that McCarthy was not invited to the Nearman robbery nor the Woolcott robbery.

VII.

There is an entire failure of proof to show that the failure to warn David of the intended attempt to rob the cars had a causal connection with or was the proximate cause of the fatal injury.

St. L. & S. F. R. Co., v. *Mills*, 271 U. S. 344.
Feaster v. *So. Ry. Co.*, 15 Fed. (2nd) 540.
Lowrey v. *Atl. Joint Terminals*, 145 Ga. 782.

VIII.

The Jury Were Left to Conjecture, Speculation and Guess Work Owing to Lack of Evidence to Find.

First. Whether McCarthy made any efforts to communicate with Boultt.

Second. Whether McCarthy had any opportunity without uncovering himself to communicate with Boultt, so as to apprise him of the intended attempt to rob the cars.

There was no evidence that McCarthy had an opportunity to telephone to Boultt nor that there was any telephone in the drug store, nor, if there was one, that McCarthy had access to it.

Third. What David could or would have done and what the railroad company could have done to avert the shooting even though McCarthy had made his report and David had been warned of the intended robbery.

It is respectfully submitted that the judgment below was for the wrong party; that the writ of certiorari should be issued as prayed to the end that the judgment may be reversed.

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